

SERVED: December 11, 2007

NTSB Order No. EA-5346

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 6<sup>th</sup> day of December, 2007

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ROBERT A. STURGELL,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Dockets SE-17576
v.	)	and SE-17575
	)	
MARIA A. JEANMAIRE and	)	
BRADLEY S. McMATH,	)	
	)	
Respondents.	)	
_____	)	

**OPINION AND ORDER**

Respondents have appealed from the oral initial decision and order of Chief Administrative Law Judge William E. Fowler, Jr., issued November 29, 2006, in this matter.<sup>1</sup> On October 6,

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<sup>1</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached. Respondents' appeals were consolidated for hearing.

2005, the Administrator issued orders of suspension with waivers of penalty<sup>2</sup> against both respondents' airline transport pilot certificates, based on alleged violations of 14 C.F.R.

§§ 91.123(a) and (b),<sup>3</sup> 91.183(c),<sup>4</sup> and 91.13(a).<sup>5</sup> The law judge determined that Respondent Jeanmaire had violated § 91.123(a) and (b), as well as § 91.13(a); in addition, the law judge concluded that Respondent McMath violated §§ 91.123(b) and 91.13(a).<sup>6</sup> Respondents appeal the law judge's decision with

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<sup>2</sup> The suspension period for respondents' alleged violations was 60 days each, but the Administrator waived the penalty against both respondents, because the air traffic control (ATC) specialist did not timely notify respondents of their deviation from their assigned heading.

<sup>3</sup> Section 91.123(a) prohibits pilots-in-command (PICs) from deviating from an air traffic control clearance that they have obtained unless the PIC obtains an amended clearance, or an emergency exists, or the deviation is in response to a traffic alert and collision avoidance system resolution advisory. Similarly, section 91.123(b) states that, "[e]xcept in an emergency, no person may operate an aircraft contrary to an [ATC] instruction in an area in which air traffic control is exercised."

<sup>4</sup> Section 91.183(c) requires PICs who are operating their aircraft under instrument flight rules in controlled airspace to maintain a continuous watch on the appropriate radio frequency and to report by radio information relating to the safety of the flight as soon as possible.

<sup>5</sup> Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

<sup>6</sup> We note that the Administrator does not dispute the law judge's conclusion that the Administrator did not prove violations of § 91.183(c), and that Respondent McMath did not violate § 91.123(a).

regard to the aforementioned violations, and argue that the law judge also erred in denying respondents' two pre-trial motions.<sup>7</sup> We deny respondents' appeals.

The Administrator's October 6, 2006 orders, which served as the complaints before the law judge, alleged that Respondent Jeanmaire acted as PIC and Respondent McMath acted as second-in-command (SIC) of a Hawker 800XP departing from Charlotte, North Carolina, on April 26, 2003, in which respondents deviated from a clearance and heading that ATC assigned to respondents. The complaints allege that ATC attempted to establish radio contact with respondents to advise them of their deviation and of other traffic in the area, but that respondents did not respond to the transmissions from ATC until respondents had reached a heading of 333 degrees. The complaints assert that ATC did not clear respondents' aircraft for a turn to a heading of 333 degrees, and that, as a result of respondents' deviation, a loss of separation with a US Airways Express flight occurred. The complaints also allege that respondents neither declared an emergency nor obtained an amended clearance from ATC for their

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<sup>7</sup> Respondents' motions included a motion for imposition of sanctions for failure to comply with discovery and pre-hearing order, and a motion for an order to show cause to be issued against the Administrator under 49 C.F.R. 821.60 *et seq.*

deviation. As a result, the Administrator's complaints alleged violations of §§ 91.123(a) and (b), 91.183(c), and 91.13(a).

At the hearing, the law judge first addressed preliminary matters, at which time respondents' counsel argued that the law judge should grant respondents' motion for sanctions, on the basis that another administrative law judge who initially oversaw the case had issued a pre-hearing order that should still be in effect, but that the Administrator's counsel did not comply with the order. Tr. at 7. The law judge determined that the parties had exchanged their exhibits and names and addresses of witnesses, and that the original law judge's order was therefore a legal nullity. Id. Respondents' counsel also argued that the law judge should grant respondents' motion for an order to show cause regarding the Administrator's counsel's alleged ex parte communication with the Safety Board's Office of Administrative Law Judges. Tr. at 7-8. The law judge denied the motion, on the basis that any communication that occurred was procedural, and not substantive, and was therefore permissible under the Board's Rules of Practice. Id. The law judge subsequently ordered commencement of the hearing.

In support of the Administrator's case, the Administrator's counsel called FAA Quality Assurance Specialist Loretz Ramseur. Tr. at 18-19. Mr. Ramseur testified that he investigated respondents' alleged deviation, and described several records

from his investigative file regarding the event.<sup>8</sup> Mr. Ramseur stated that the ATC audiotape indicates that respondents acknowledged the headings that ATC provided to them, but that they were not flying in accordance with the assigned headings. Tr. at 56 (stating that, at the time that ATC issued a heading of 260 to respondents, they were flying on a heading of 332). Mr. Ramseur also stated that respondents never declared an emergency, and that respondents could have contacted ATC via their transponder if an emergency situation existed. Tr. at 59-60.

In addition, the Administrator called FAA Air Traffic Controller Robert Szymkiewicz, an air traffic controller at the Charlotte, North Carolina Airport who was on duty at the time of the alleged events. Mr. Szymkiewicz testified that the pilots of another aircraft advised Mr. Szymkiewicz that they had to react to a resolution advisory because of respondents' loss of separation with their aircraft. Tr. at 97-98. Mr. Szymkiewicz acknowledged that aircraft are not always able to keep the

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<sup>8</sup> Tr. at 20 (Exh. 1-A, Pilot Deviation package), 22 (Exh. 1-B, Pilot Deviation Report), 24 (Exh. 1-C, personnel statement from Air Traffic Controller George Kuhn), 25 (Exh. 1-D, personnel statement from Air Traffic Controller Bob Siskovitch), 27 (Exh. 1-E, plot of tracks of both aircraft involved in loss of separation), 29 (Exh. 1-F, data of tracks of both aircraft), 38 (Exh. 1-H, ATC audiotape), 46 (Exh. 1-G, timeline showing the headings ATC issued to respondents' aircraft, and the headings on which respondents actually operated).

headings that ATC assigns to them, but, when pilots cannot comply with the assigned headings, they should inform ATC, which will then assign different headings and make arrangements to maintain separation between aircraft. Tr. at 100, 103.

Mr. Szymkiewicz testified that pilots do not usually declare an emergency as a result of weather, and that no other aircraft at Charlotte on that day made any significant deviations as a result of the weather. Tr. at 104.

The Administrator also called FAA General Aviation Safety Inspector Todd Kuhn, who worked with Mr. Ramseur on the investigation into respondents' alleged deviation. Mr. Kuhn testified that he obtained statements from both respondents regarding the alleged deviation, and both respondents stated that they "tried to keep [their] deviation[s] to a minimum." Tr. at 118 (Exh. 2, Respondent Jeanmaire's statement), 120 (Exh. 5, Respondent McMath's statement). In addition, Mr. Kuhn testified that, according to the Aeronautical Information Manual (AIM), pilots are required to communicate with ATC, either via radio or transponder. Tr. at 126; Exh. 6 (excerpts from AIM). Mr. Kuhn also stated that he concluded that weather was a factor in the alleged deviation, that respondents ultimately flew to a heading of 333 degrees, and that "there was plenty of time" for respondents to request an amended clearance from ATC, but that respondents did not do so. Tr. at 127-28. Mr. Kuhn opined that

respondents did not communicate their needs to ATC appropriately, as the other aircraft in the area had done. Tr. at 130.

At the conclusion of the Administrator's case, respondents' counsel made a motion to dismiss the case, arguing that the Administrator had not established a *prima facie* case for each of the alleged regulatory violations. Tr. at 161-62. In particular, respondents' counsel argued that § 91.123(a) applies to PICs, but that the Administrator acknowledges that Respondent McMath acted as SIC on the flight at issue. Tr. at 161. In addition, respondents' counsel argued that the Administrator's complaint did not allege that respondents had violated an ATC instruction, but that they violated an ATC clearance, and that § 91.123(b) addresses non-compliance with ATC instructions. Tr. at 161. In response, the Administrator's counsel stated that the respondents' aircraft required two pilots, and that, therefore, Respondent McMath was required to observe the same standards as Respondent Jeanmaire. Tr. at 165. In addition, the Administrator argued that respondents' distinction between a clearance and an instruction was misleading, because a clearance is an instruction. Tr. at 178-79. The law judge concluded that the Administrator had established a *prima facie* case, and denied respondents' motion to dismiss. Tr. at 166-67.

In support of their rebuttal of the Administrator's case, Respondent McMath testified that he and Respondent Jeanmaire expected "to get turned to the south pretty quick," and was surprised that ATC did not direct them to turn south. Tr. at 228, 232. Respondent McMath did not contact ATC about the lack of an instruction to turn south, and opined that ATC would take care of their turn. Tr. at 232-33. Respondent McMath also stated that he believed that he and Respondent Jeanmaire were working with ATC "as a team" in an attempt to avoid weather and traffic, as necessary. Tr. at 247, 251. Respondent McMath testified that his practice, if he could not follow ATC's instructions, was to ask ATC for an alternate plan (Tr. at 253), and keep ATC informed of the instructions that he could not accept (Tr. at 255). Respondent McMath stated that he was unaware that they had deviated from their assigned headings, and that he would not react differently if the situation were to occur again. Tr. at 280-82. Respondent Jeanmaire also testified, and her testimony did not contradict any of Respondent McMath's testimony. Respondent Jeanmaire testified that she did not believe she needed to inform ATC "about the weather," and that she believed it was her responsibility "to deviate around the weather." Tr. at 343. Respondents also called Mr. Randy Robert Hutton, the director of aviation and chief pilot for Harley-Davidson Motor Company; and Mr. Michael



Allen Tomlinson, an expert witness on the hazards that result from operating aircraft in or near thunderstorms. Both Messrs. Hutton and Tomlinson opined that respondents acted appropriately during the flight at issue.

On appeal, respondents present a variety of arguments. First, respondents argue that the law judge erred in affirming the Administrator's allegation that respondents violated § 91.123(a) by deviating from their clearance heading of 295 degrees. Respondents argue that the Administrator did not present adequate evidence to support the allegation that respondents impermissibly deviated to a heading of 333 degrees, and that they acted appropriately under the serious circumstances. Respondents also argue that ATC did not assign them a specific heading, but only a specific altitude, and that ATC permitted them to deviate to the right, and granted them broad discretion to take steps to avoid the thunderstorm.

With regard to the law judge's finding that Respondent Jeanmaire violated § 91.123(b) by operating in a manner that was contrary to an ATC instruction, Respondent Jeanmaire's argument is two-fold: (1) that the Administrator did not allege any specific "instruction" that she violated; and (2) that the Administrator did not provide any evidence that the clearance ATC had issued was an "instruction." With regard to the law judge's finding that respondents violated § 91.13(a),

respondents argue that this alleged violation would have to be based on a preexisting operational violation, and the Administrator did not prove any such operational violations. Respondents also argue that the law judge based his decision on respondents' loss of separation with the US Airways Express aircraft, but that no provision of the Federal Aviation Regulations requires maintenance of a constant amount of separation. Respondents also present two affirmative defenses for their conduct in the flight at issue. First, they maintain that they were required to deviate from the rules, due to an emergency thunderstorm and other aircraft traffic. Second, respondents argue that ATC was the principal cause of their deviation in the first place, because ATC did not allow their flight to remain on its cleared route, but vectored it into and near a severe thunderstorm.

In addition, respondents argue that the law judge erred in denying both of their pre-trial motions as a "legal nullity." Respondents argue that the Administrator did not comply with the initial pre-hearing order, and that they did not have time to file a motion to compel that would order the Administrator's compliance; therefore, respondents assert that an imposition of sanctions against the Administrator is their sole remedy. Finally, respondents argue that the Administrator's act of contacting the Safety Board's Office of Administrative Law

Judges to inquire about whether the pre-hearing order was still in effect constituted impermissible ex parte communication. Respondents argue that the prejudice that resulted from the Administrator's lack of compliance with discovery resulted in their inability to obtain the testimony of the air traffic controller who issued the clearances; respondents assert that the Administrator's initial discovery responses indicated that this controller would be present at the hearing, but that the Administrator did not provide the controller, and respondents did not subpoena him. Finally, respondents argue that the suspension order was outside the scope of the Administrator's statutory authority, because certificate actions such as those that the Administrator contemplates here would cause pilots to operate aircraft in an unsafe manner, to ensure compliance with ATC directives. In response, the Administrator contests each of respondents' arguments and urges us to affirm the law judge's decision.

#### Alleged Regulatory Violations

We have previously held that, "given the time-sensitive nature of ATC communications and aviation operations, combined with the fact that air traffic controllers must communicate with multiple aircraft within the same short period of time," operators may not choose to defy ATC instructions in the absence

of emergency circumstances.<sup>9</sup> With regard to situations in which pilots determine that they cannot comply with an ATC instruction, they may inform ATC of the emergency situation, or of the circumstances surrounding their inability to comply with the instruction. For example, in Administrator v. Heras, NTSB Order No. EA-5102 (2004), we held that a respondent's unauthorized deviation from an ATC clearance violated § 91.123, even though the respondent asserted that his deviation was justified as a result of weather that he observed, and resultant turbulence. Id. at 4 n.6. We affirmed the law judge's decision, which noted that respondent had not established a record regarding the weather conditions, and that respondent had the option to advise ATC of his need to deviate from the clearance, but did not do so. Id. at 4 n.7. Given that respondent had not established the existence of an emergency, we also found that respondent had operated the aircraft in a reckless manner, in violation of § 91.13(a). Id.

Here, respondents did not declare an emergency, and did not advise ATC that they needed to exceed ATC's amended clearance of approximately 300 degrees. In his testimony, Respondent McMath,

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<sup>9</sup> Administrator v. McCarthney, NTSB Order No. EA-5304 at 8 (2007) (quoting Administrator v. McGuire, 4 NTSB 1824, 1827 (1984), and citing Administrator v. Jesch, 7 NTSB 1256, 1257 (1991); Administrator v. McKinley, 7 NTSB 798, 800 (1991); Administrator v. Degan, 1 NTSB 1904, 1907 (1972)).

who was responsible for ATC communications during the flight, did not deny that he had sufficient time to declare an emergency. Tr. at 272. In addition, Respondent Jeanmaire stated that she did not believe the conditions of the flight constituted an emergency. Tr. at 337. Both respondents stated that, if they encountered the same conditions again, they would not do anything differently. Tr. at 281-82, 341.

Moreover, in spite of their affirmative defense of the existence of an emergency, respondents have not provided conclusive evidence indicating that they encountered emergency conditions. We have previously held that, "in asserting an affirmative defense, the respondent must fulfill his or her burden of proving the factual basis for the affirmative defense, as well as the legal justification."<sup>10</sup> Here, Mr. Kuhn testified that none of the other aircraft in the vicinity of the storm declared an emergency, but that several aircraft worked with ATC to obtain amended clearances and headings as needed to avoid the weather (Tr. at 117); furthermore, none of the other aircraft in the vicinity of respondents' flight made any significant deviations as a result of the weather (Tr. at 104). The

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<sup>10</sup> Administrator v. Nadal, NTSB Order No. EA-5308 at 10 (2007) (citing Administrator v. Gibbs, NTSB Order No. EA-5291 at 2 (2007); Administrator v. Kalberg, NTSB Order No. EA-5240 at 3 (2006); Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994)).

evidence that respondents presented at the hearing, which included a variety of documents regarding the danger of thunderstorms, as well as expert testimony regarding such danger, does not prove that the thunderstorm that respondents encountered excused their failure to advise ATC of their needs, or their failure to declare an emergency before, or during, their deviation. Overall, the evidence on this record indicates that respondents had the opportunity to declare an emergency, work with ATC to obtain an amended heading, and keep ATC informed of their needs, in general. Respondents did not take advantage of any of these opportunities, but instead deviated from the amended heading that ATC had issued.

Respondents also argue that ATC created the predicament that they encountered, and that, as a result, their violation of § 91.123(b) was justified. We note that the evidence of respondents' deviation is not abundantly clear: ATC allowed respondents to turn "about thirty degrees right," but did not issue an unambiguous limit on respondents' turn. Exh. R-1 at line 180. However, respondents do not dispute that they turned to 333 degrees, and the evidence indicates that they requested the right turn of 30 degrees when they were proceeding at 270 degrees. On this record, and under these circumstances, we note that respondents were obligated to inform ATC if they determined that they needed to proceed on a course that was more than 30

degrees to the right. Respondents did not inform ATC of this necessity, and did not ask for clarification regarding the limit of their turn. After reviewing the evidence in its totality, we find that the record indicates that ATC and respondents mutually agreed that respondents would not exceed a turn of more than approximately 30 degrees, but that respondents significantly exceeded this amount without requesting an amended clearance, and without informing ATC of their needs. Respondents' implication that ATC, in failing to provide an explicit limit of their turn, in effect granted them permission to turn in an unlimited manner is unpersuasive.

In this regard, we also note that we have previously held that an operator's failure to adhere to an ATC instruction will often render the operator in violation of § 91.13(a), because, in general, such refusal is careless and reckless.<sup>11</sup> Here, as stated above, respondents did not comply with the mutual understanding that they would proceed about 30 degrees right, and instead significantly exceeded 30 degrees. Moreover, respondents did not inform ATC that the circumstances required them to exceed 30 degrees, nor did respondents request clarification from ATC. Given their violation of the

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<sup>11</sup> McCarthy, supra; see also Heras, supra; Administrator v. Ferger, NTSB Order No. EA-4228 at 3 (1994).

regulations discussed above, we also find that respondents violated § 91.13(a).

#### Procedural Issues

Respondents also argue that the law judge erred in denying their pre-trial motions, which were based on procedural issues. We have reviewed these motions and the record, and determined that the law judge's rulings were not erroneous. First, the motions are based in part on the Administrator's counsel's contact with the Board's Office of Administrative Law Judges, which respondents argue was impermissible ex parte communication. Our Rules of Practice state, and we have previously held, that counsel for either party may contact the Office on a procedural matter, but that discussion of substantive issues is impermissible.<sup>12</sup> Furthermore, with regard to procedural issues in general, we have previously reviewed law judges' rulings on such matters under an abuse of discretion standard.<sup>13</sup>

Respondents allege that the Office of Administrative Law Judges informed the Administrator's counsel that the previous

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<sup>12</sup> 49 C.F.R. § 821.61(b); see, e.g., Administrator v. Baehr, NTSB Order No. EA-4075 at 4 (1994).

<sup>13</sup> See Administrator v. Van Ovost, NTSB Order No. EA-4681 at 2 (1998) (holding that the law judge did not abuse his discretion regarding a ruling concerning the Administrator's failure to adhere to a pre-hearing order).



pre-hearing order was no longer in effect, because Chief Judge Fowler had become the judge. While procedural and not substantive, such communication should have prompted the Office of Administrative Law Judges to inform respondents' counsel of the status of the order. Moreover, respondents' counsel argues that the Administrator's failure to comply with the pre-hearing order prejudiced respondents' case, because the Administrator's initial discovery response indicated that the Administrator would call Air Traffic Controller George Kuhn to testify, but the Administrator subsequently did not call Mr. Kuhn. Respondents have not established that Mr. Kuhn's absence prejudiced their case. We have previously held that, where a party determines a need for a particular witness's testimony, that party must take independent steps to ensure that the witness will be available at the hearing.<sup>14</sup>

In addition, we have long held that our law judges have significant latitude in overseeing hearings and discovery matters.<sup>15</sup> In this regard, the Board's law judges have

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<sup>14</sup> See Administrator v. Sleight, NTSB Order No. EA-4979 at 2 (2002) (citing Administrator v. Grantham, NTSB Order No. EA-4287 at 3-4 (1994); Administrator v. Wang, NTSB Order No. EA-3719 at 9, n.10 (1992)).

<sup>15</sup> Administrator v. Robertson, NTSB Order No. EA-5315 at 3 (2007) (citing 49 C.F.R. §§ 821.19(b), 821.35(b)); see also Administrator v. Zink, NTSB Order No. EA-5262 at 3 (2006).

previously allowed continuances of some hearings where a party has shown that a witness that is integral to their case is unavailable.<sup>16</sup> Here, respondents did not subpoena Mr. Kuhn, and did not ask the law judge to continue the hearing so they could attempt to obtain his testimony. Finally, asserting that Mr. Kuhn would have helped them prove that respondents did not commit any violations, respondents request that we draw an adverse inference against the Administrator. Such an assertion is based on speculation, and we do not find it persuasive; as such, we decline to draw this inference.

#### Conclusion

Overall, respondents have not shown that the law judge's rulings on these procedural motions amounted to an abuse of discretion; therefore, we decline to reverse the law judge's conclusions. In addition, the Administrator proved by a preponderance of the evidence that respondents violated §§ 91.123 and 91.13(a), as alleged.

#### **ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondents' appeals are denied; and
2. The law judge's initial decision, affirming the Administrator's orders of suspension with waivers of sanction,

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<sup>16</sup> See Administrator v. Flores, NTSB Order No. EA-5279 at 11 (2006).

is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN,  
HIGGINS, and CHEALANDER, Members of the Board, concurred in the  
above opinion and order.